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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of the Commission's Regulatory
Policies to Allow Non-U.S.-Licensed Space
Stations to Provide Domestic and International
Satellite Service in the United States

and

Amendment of Section 25.131 of the
Commission's Rules and Regulations to
Eliminate the Licensing Requirement for
Certain International Receive-Only Earth
Stations

and

COMMUNICATIONS SATELLITE
CORPORATION

Request for Waiver of Section 25.131(j)(1)
of the Commission's Rules As It Applies to
Services Provided via the Intelsat K
Satellite

IB Docket No. 96-111

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CC Docket No. 93-23
RM-7931

File No. ISP-92-007

MCI REPLY COMMENTS

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby replies to the initial comments submitted by other parties in response to the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceedings. MCI will generally limit its comments herein, as it did in the initial comment round, to the applicability of the Commission's ECO-Sat framework to FSS and DBS/DTH services.

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MCI strongly supports the Commission's objectives in proposing an ECO-Sat test. As MCI explained in its initial comments, the Commission's proposed rules offer a more coherent framework for accomplishing the Commission's main goal -- fostering "the greatest possible availability of efficient and innovative satellite communications services for users in the United States."¹ The proposed ECO-Sat test is appropriately designed to attain the Commission's underlying objectives, i.e., "the benefits of effective competition and open satellite communications markets, the need for responsible spectrum management, and [avoiding] the dangers of market distortions."² The Commission's proposal does not represent a new policy, but rather a formalization of Commission practice that will bring greater clarity and predictability to future Commission actions in this area.³

¹ NPRM at ¶ 8.

² Id. at ¶ 12.

³ The Commission has plainly acted within its jurisdiction in proposing the ECO-Sat test. See NPRM at ¶ 7; MCI at note 6; Motorola at 16-20. There is no merit whatsoever in the strained argument made by one commenter that the Commission has constructed a reciprocity test that would usurp Executive Branch authority over matters of international trade. See ICO at 10-16. The objective of the ECO-Sat test is "not to secure open markets as an end in itself...[but to ensure that foreign affiliates'] entry promotes rather than hinders competition in the U.S. international [and domestic] services market[s]]." See MCI at 6. MCI believes that the Commission's reasoning in the Market Entry Order -- that the proposed test would be a complement to Executive Branch actions in the trade area rather than an infringement on the Executive Branch's "ultimate responsibility for trade matters" (Market Entry Order at ¶ 235), and that the Commission's proposed rules would not violate any existing U.S. international trade obligations or policies (see, e.g., Market Entry Order at ¶ 239-244) -- also applies in the present case. Moreover, the United States is not under any obligation that would prevent the Commission from adopting the ECO-Sat test -- which remains subject to overriding input from the Executive Branch, as necessary -- before the conclusion of the WTO negotiations on basic telecommunications.

DISCUSSION

A. THE COMMISSION SHOULD ADOPT THE ECO-SAT TEST FOR FSS AND DBS/DTH SERVICES AS RECOMMENDED IN MCI'S INITIAL COMMENTS

A substantial majority of the parties filing comments addressing the applicability of the Commission's proposals to point-to-point and point-to-multipoint satellite services -- FSS and DBS/DTH -- support the Commission's goal of ensuring that U.S. licensing of the use of foreign-licensed satellites occurs under a fair and consistent framework that continues to protect U.S. consumers against deleterious market distortions.⁴ Whatever merit there may be to claims that the Commission should delay the adoption of a formal rule applying the ECO-Sat test to global systems or IGOs and their affiliates, no party has established good cause for delay in formalizing the applicability of the ECO-Sat test to applicants for authority in FSS and DBS/DTH services.⁵

⁴ AlphaStar at 2; AT&T at 4-5; Columbia at 6; DIRECTTV & Hughes at 5; General Instrument at 3; Home Box Office (HBO) at 3; Orion at 2-3; PanAmSat at 2. Investors and participants in evolving global systems including, but not limited to, MSS -- systems which tend not to have readily identifiable "home markets" or "route markets" -- are far from unanimous in support of the ECO-Sat framework, especially with regard to the "critical mass" issue. Supporters include AirTouch (at 3-8), Motorola (at 27-31), Teledesic (at 7-9), and TRW (at 12-17). Opponents include ICO (at 32-37) and Loral (at 13-14). ORBCOMM (at 3-4) offers qualified support and TMI (at 13-15) asserts that the "critical mass" test is inapplicable to regional MSS, as offered by TMI and AMSC. A third category of commenters, those who address the applicability of the Commission's proposal to intergovernmental organizations (IGOs) and their affiliates, is divided into two groups based on ownership and affiliation. Supporters of application of ECO-Sat, with or without additional safeguards, to IGOs include: AMSC (at 5-6), AT&T (at 14-17), Columbia (at 21-25), GE Americom (at 10-12), Home Box Office (at 20-21), Lockheed Martin (at 13-14), Loral (at 26-27), Motorola (at 40-44), ORBCOMM (at 4-8), Orion (at 12-16), PanAmSat (at 5-6), and TRW (at 18-26). Opponents include COMSAT (at 3-7) and INTELSAT (at 5-10).

⁵ To the extent that Teledesic or other parties can demonstrate that their satellite systems possess technical or service characteristics that do not lend themselves to the "home market/route market" analysis that typically would apply to FSS and DBS/DTH systems, the ECO-Sat test should (as recommended by MCI and others) be sufficiently flexible to accommodate such non-

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The Commission appropriately proposed to apply the ECO-Sat test to DBS, and no party has justified its exclusion. WTCI has attempted to persuade the Commission to eject DBS from the ambit of the ECO-Sat test. WTCI asserts that “[s]ince DBS is essentially one-way and does not provide service on ‘routes’ (i.e. two-way communications), the Commission’s competitive distortions concern has no relevance to DBS” and that DBS should therefore be excluded from the ECO-Sat test. (WTCI, at 10.) While DBS is “essentially one-way,” there is no international or domestic prohibition on the use of DBS frequencies to provide two-way services.⁶ Even considering just “one-way” services, in cases where the “footprint” of the satellite covers more than one country and legal or regulatory restrictions in other countries within the footprint preclude entry by U.S. firms, allowing a DBS satellite from such a country to access the U.S. market would provide that operator with the opportunity to leverage those restrictions to cause competitive distortions in the U.S. market. As MCI explained in its initial comments, competitive distortions are of equal concern for one-way as for two-way services.⁷ In short, in cases where

⁵(...continued)
traditional “FSS” services.

⁶ The ITU Region 2 allocation clearly permits the space-to-Earth frequencies in the DBS band to be used for “transmissions in the fixed-satellite service,” provided that the band is used “principally for the broadcasting-satellite service.” (See Section 2.106 of the Commission’s Rules, 47 C.F.R. Section 2.106 at n. 846). The Commission’s rules similarly afford flexibility of use, requiring only that the principal use be direct broadcast satellite service. Revision of Rules and Policies for the Direct Broadcast Satellite Service, FCC 95-507, ¶ 12 (rel. Dec. 15, 1995). With the elimination of the regulatory distinction between domestic and international satellites in Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, FCC 96-14 (rel. Jan. 22, 1996) there is no reason, apart from normal interference-related licensing and coordination issues, that DBS frequencies cannot be used, on an ancillary basis, to provide fixed satellite services on “routes” within ITU Region 2.

⁷ MCI Comments at 16-19.

the "footprint" of a non-U.S. DBS satellite covers the U.S. and another nation, it is appropriate to safeguard against competitive distortions by requiring an ECO-Sat review of the earth station applications associated with that non-U.S. satellite.⁸

MCI does not support a general exception for video services, because such an exception would be far broader than necessary to address the commenters' concerns. Certain earth station operators, including the Networks,⁹ express concern that ECO-Sat review may delay the initiation of service, particularly service needed to provide coverage of "fast-breaking" news. However, many of the video transmission links described by the Networks (such as those between a television network's London bureau and its U.S. affiliates) are relatively permanent; other video transmission needs (e.g., coverage of Olympic Games, Wimbledon or the World Cup) can be planned, and necessary authorization obtained, on a temporary and narrowly delimited basis, well

⁸ MCI Comments at 8-19. WTCI makes the unfounded claim that DBS is distinguishable because international regulation specifically contemplates the joint use of DBS orbital slots. To the contrary, permanent sharing of DBS slots, except to the extent specified in the original a priori plan developed by the ITU, is discouraged. WTCI's citation to ITU Resolution 42 is inapposite. (WTCI at 9, n.25) WTCI has quoted one of several "Considering" clauses completely out of context in support of a claim that a permanent arrangement for the sharing of a single satellite between the U.S. and Canada is contemplated by the ITU BSS Plan. In order to reach this conclusion, WTCI ignores the Resolution's title ("Use of Interim Systems in Region 2 in the Broadcasting-Satellite... Service[.]...") and the substantive provisions of the implementing Annex, which limit all such interim arrangements to a specified period not to exceed ten years, subject to the agreement of all affected administrations. Resolution 42 is clearly inapplicable to Telesat's unilateral plan to permanently extend the footprint from DBS satellites located in Canadian slots to cover CONUS. On the contrary, it is clear that nations have no inherent right to transfer "excess capacity" to other administrations. See Appendix 30 (Orb-85) § 4.4: "When a frequency assignment in conformity with one of the Regional Plans is no longer required...the administration concerned shall immediately so inform the Board. The Board shall publish this information in a special section of its weekly circular and delete the assignment from the appropriate Regional Plan."

⁹ Comments of Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (the Networks), at 2-3.

in advance of actual need. MCI would not object to a narrower exception, or a special procedure for handling applications for limited, temporary authority to utilize non-U.S. satellites to cover "fast-breaking" news events, where timing considerations preclude the use of a formal ECO-Sat analysis.

The majority of the commenting parties generally support an ECO-Sat test as formulated by the Commission and have proposed relatively minor modifications along the lines recommended by MCI. Given the broad support among affected parties, and for the reasons stated in MCI's initial comments, the Commission should implement ECO-Sat for FSS and DBS/DTH essentially as proposed in the NPRM.¹⁰

¹⁰ In light of the views expressed by some commenters, the following points bear reiteration or amplification:

- It is entirely reasonable to place some administrative responsibility on the applicant, who would receive substantial economic benefits from the use of foreign satellites. Administrative tasks are likely to be shared by another beneficiary of a successful earth station application -- the foreign satellite operator -- which will have every incentive to cooperate in the process, and the burden on the earth station applicant would pale in comparison to the burdens that would arise from duplicative space segment licensing (an entirely inappropriate alternative).
 - It is the applicant and the foreign satellite operator -- and not the opponent -- that have the best access to the relevant information.
 - Although foreign space segment providers could "better accommodate the range of factual considerations that may arise with respect to various types of services -- and thus promote speedier delivery of those services to customers" (COMSAT at 34-35) -- the earth station applicant bears the ultimate responsibility of demonstrating that its use of the foreign satellite is in the public interest. Thus, any factual support provided by a foreign space station provider should be both directly relevant and should be verified by the earth station applicant.
 - No party has demonstrated that it would be advisable to rely on a "list" of markets in which a single U.S. operator has been authorized to provide service as "prima facie"
- (continued...)

B. AVAILABILITY OF DOMESTIC CAPACITY SHOULD BE CONSIDERED AS PART OF THE PUBLIC INTEREST ANALYSIS WITHIN THE ECO-SAT TEST

The Commission should reject the assertion of Newcomb/Mobile Datacom and WTCI that the Commission should not employ an ECO-Sat analysis in any situation where there is a "shortage of domestic capacity."¹¹ Instead, the Commission should consider capacity limitations as part of its public interest analysis. Adoption of the Newcomb/Mobile Datacom or WTCI recommendations would simply engender debate over the definition of a "shortage of domestic capacity" and whether it exists in a particular case,¹² when parties should instead be focused on competitive distortion and relevant public interest factors. In fact, in certain alleged "shortage" situations, there may be an even greater potential for competitive distortion and, thus, an increased need to analyze the very factors relevant to a formal ECO-Sat test. If, for example, competition in a certain satellite service is in the nascent stages in the United States, it may take time to deploy the capacity needed to establish full-fledged competition. If a particular earth station applicant wishes to use a foreign satellite, licensed by a neighboring country with closed borders and a protected monopoly, to compete with the nascent U.S. service providers, analysis

¹⁰(...continued)

evidence that these markets are open for a particular type of service. Such a list is unlikely to be of much value. Some countries allow use of U.S. facilities for incidental traffic or in emergencies, but are otherwise closed to U.S. satellite providers. Thus, reliance on such superficial lists would likely be misleading. Also, it would be unreasonable to impose the burden on U.S. satellite licensees to compile and submit such data, which may be considered competitively sensitive.

¹¹ Newcomb Communications, Inc. and Mobile Datacom Corporation (joint comments) at 4-7, WTCI at 3.

¹² In MCI's view, a cognizable shortage of domestic satellite capacity exists only when all available capacity is saturated and current demand remains unsatisfied. A domestic shortage does not exist merely because a putative supplier of services is unable to secure a license.

of the competitive distortion would be critical, whereas a “shortage of domestic capacity” debate would be counterproductive. Therefore, MCI urges the Commission to consider “shortages” only as part of the public interest portion of the ECO-Sat analysis.

MCI agrees with HBO that the Commission should consider, as part of its ECO-Sat analysis, the extent to which the proposal will affect the availability of adequate capacity to meet the needs of customers within the United States. As HBO notes, spectrum and the orbital arc are finite resources, such that attainment of the Commission’s policy goals may require a balance between the potentially conflicting objectives of opening the U.S. market to competition from foreign-licensed satellites and of ensuring the fulfillment of domestic telecommunications needs. (HBO at 8-9.) This balance may be attained most effectively by inclusion of the scarcity factor as a component of the “public interest” analysis within the ECO-Sat framework. After the Commission has determined that there are no de jure or de facto barriers to entry by U.S. companies in the relevant market, and after according deference to the views of the Executive Branch agencies on matters within their respective areas of expertise, the Commission should weigh the “scarcity” factor equally with all other factors relevant to the determination of whether grant of the particular application would serve the “public interest, convenience and necessity.”

C. THE ECO-SAT TEST SHOULD BE APPLIED TO PENDING APPLICATIONS, AS WELL AS THOSE FILED SINCE THE DATE OF THE NPRM

The Commission’s tentative conclusion that it should not apply the policies adopted in this proceeding to pending applications was supported by two parties with applications pending at the time the NPRM was adopted -- WTCI and WorldCom.¹³ Two parties, AlphaStar and Columbia,

¹³ Three other companies, not claiming to have applications pending at the time they filed
(continued...)

recommend that the Commission apply the ECO-Sat test to some or all pending applications. AlphaStar supports application of the ECO-Sat test to all pending applications, and exclusion of only those licenses or authorizations already granted.¹⁴ Columbia recommends that the test be applied to all pending applications filed after the release of the Commission's DISCO I NPRM, in which the Commission first gave notice that it intended to establish clearer guidelines for access by foreign satellite systems to the U.S. market.¹⁵

MCI supports Columbia's recommended approach. The ECO-Sat test is more a procedural change than a substantive one, in that it represents a more formalized approach to the application of principles heretofore used on a case by case basis in the evaluation of Title III applications involving non-U.S. satellites. The Commission made clear in the DISCO I NPRM that it was contemplating improvements in its approach, so that all entities filing applications after that date were on notice of potential changes.¹⁶ It is thus fair to pending applicants, potential

¹³(...continued)

comments, recommended that the Commission process any applications filed after the date of adoption of the NPRM, but prior to the adoption of final rules, under existing rules. Charter Communications International, Inc., at 4-5; National Telecom Satellite Communications, Inc. (NATSAT), at 1-2; Transworld Communications (U.S.A.), Inc. at 4-5. As the Commission noted in the NPRM, at para. 21, there can be no doubt that applicants filing after the adoption date of the NPRM will have had sufficient notice of the policies to be adopted as to make it fair to apply the policies to them.

¹⁴ AlphaStar at 3.

¹⁵ Columbia at 9-10.

¹⁶ The Commission has a well-established policy of applying new rules to the processing of pending applications. McElroy Electronics Corp., 77 R.R.2d 1187, 1191 (1995), rev'd on other grounds sub nom. McElroy Electronics Corp. v. FCC, 1996 U.S. App. Lexis 14915, June 21, 1996 ("McElroy"). In McElroy Electronics Corp., the Commission applied a new "five-year fill-in rule" to a cellular application which was pending prior to the revision of the rules.

applicants and other interested parties to apply the rules that are adopted in this proceeding to those who filed after release of the DISCO I NPRM.

D. ONLY EARTH STATION APPLICATIONS WHICH ARE ASSOCIATED WITH LICENSED OR OPERATIONAL SPACE STATIONS SHOULD BE ELIGIBLE FOR ECO-SAT REVIEW

In a recent order dismissing earth station applications filed by TelQuest and WTCI,¹⁷ the International Bureau summarized the Commission's general policy of not acting upon applications for earth station authorizations unless the space station with which the earth station intends to communicate has been licensed (*i.e.*, received all authority necessary to construct, launch and operate the system. As explained by the Bureau, this policy has been adopted to deter premature filings which may be made for the purpose of influencing space station licensing decisions of other countries and, more generally, to avoid expenditure of Commission resources in advance of the outcome of uncertain licensing decisions. The Commission should adopt a formal rule memorializing this policy.

Respectfully submitted,
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¹⁷ TelQuest Ventures, L.L.C., DA 96-1128, rel. July 15, 1996.

I, Sylvia Chukwuocha, hereby certify that a true copy of the foregoing "MCI REPLY COMMENTS" was served this 16th day of August, 1996, by hand-delivery or first-class mail, postage prepaid, upon each of the following persons:

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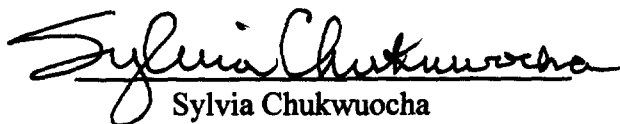
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